Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-1407

In the Supreme Court of the United States

OCTOBER TERM, 1975

RODMAN & RENSHAW, PETITIONER

v.

ROBERT SCHAEFER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

LAWRENCE E. NERHEIM,
General Counsel,

PAUL GONSON,
Associate General Counsel,

CHARLES E. H. LUEDDE,
Special Counsel,

MELVIN A. BROSTERMAN,
Attorney,
Securities and Exchange Commission,
Washington, D.C. 20549.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1407

RODMAN & RENSHAW, PETITIONER

v.

ROBERT SCHAEFER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

The Securities and Exchange Commission submits this Memorandum as *amicus curiae* in response to the Court's invitation of June 23, 1975.

STATEMENT

In August, 1967, a federal grand jury charged several individuals with having manipulated the price of the stock of Hercules-Galion Products, Inc., between 1965 and 1967, in violation of the federal securities laws, including Section 17(a) of the Securities Act of 1933, 48 Stat. 84 as amended, 15 U.S.C. 77a(a) ("Securities Act"), and Section 9(a)(2) of the Securities Exchange Act of 1934, 48 Stat. 889 15 U.S.C. 78i(a)(2) ("Exchange Act"), and in violation of the federal mail and wire fraud statutes, 18 U.S.C. 1341 and 1343 (Pet. App. A19, A21).[1]

[1]Most of those indicted were convicted. See *United States v. Projansky*, 465 F.2d 123, 124-125, n. 1 (C.A. 2).

In February, 1969, respondents, individually and on behalf of a class of persons who had purchased the stock during that period, instituted this civil action against the criminal defendants, unindicted co-conspirators and additional parties including petitioner, Rodman & Renshaw, a securities broker-dealer. The complaint alleged substantially the same events as were alleged in the indictment, and charged the named defendants with violating Section 17(a) of the Securities Act, 15 U.S.C. 77q(a); Sections 9(a)(2) and 10(b) of the Exchange Act, 15 U.S.C. 78i(a)(2) and 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5; and Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. App. A20); and with common law fraud (Pet. App. A8). Their claim against petitioner was that it had failed adequately to supervise Harris Nagorsky, one of its registered representatives, who was alleged to be a prominent figure in the manipulation scheme, and had thereby aided and abetted the alleged conspiracy, fraud and stock manipulation (Pet. App. A20-A21).

The district court dismissed respondents' Sherman Act claim on the ground that the antitrust remedy was superceded by the more specific remedies of the federal securities laws (Pet. App. A4, A7, A8).[2] Subsequently, following the decision of the Court of Appeals for the Seventh Circuit in *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123, the district court dismissed the claims under the federal securities laws against petitioner and certain other defendants, on the ground that those claims were barred by the three-year limitations period of the Illinois Securities Law (Ill. Ann. Stat. c. 121 1/2, §137.13 (1960 ed.)) which the

---

[2]Respondents have cross-petitioned this Court for a writ of certiorari to review that portion of the court of appeals' ruling which affirmed the dismissal of the antitrust claim (*Schaefer* v. First National Bank of Lincolnwood, No. 74-1366, petition for a writ of certiorari filed April 29, 1975), to which the government will file a separate response.

court in *Parrent* had deemed applicable to Rule 10b-5 actions.[3] The district court ruled that the statute of limitations had commenced to run when petitioner terminated Nagorsky's employment in October, 1965 (Pet. App. A15).

The Court of Appeals for the Seventh Circuit affirmed the dismissal of the antitrust claim (Pet. App. A37-A40), but reversed the dismissal of the Rule 10b-5 claim. The court reasoned that, although petitioner terminated Nagorsky's employment more than three years before respondents filed the suit, respondents' "allegation of fraudulent concealment is sufficiently specific to support a request for equitable tolling" until the fraud was discovered at the time the indictment was returned in August, 1967 (Pet. App. A21, A31-A33). While noting that there was authority for sustaining an implied right of action under Section 17 of the Securities Act, the court did not find it necessary to rule on the sufficiency of respondents' claim under Section 17(a) in light of the established Rule 10b-5 claim (Pet. App. A26-A27).

DISCUSSION

1. a. Petitioner contends (Pet. 7-11) that respondents' only remedy was under Section 9(a)(2),[4] which expressly prohibits the type of stock market manipulation alleged, rather than Section 10(b) and Rule 10b-5. It is well established, however, that the availability of a particular remedy under one provision of the federal securities laws does not preclude the availability of another remedy under another provision. This Court in *Securities and Exchange Commission* v. *National Securities, Inc.*, 393 U.S. 453, rejected a similar contention that Rule 10b-5 does not cover misrepresentations occurring in connection with proxy solicitations subject to the express proscriptions of Section

---

[3]Prior to the *Parrent* decision, the district court had found respondents' claim to be timely, based on Illinois' five-year fraud statute of limitations (Pet. App. A2, A4).

[4]Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e), provides that actions brought pursuant to Section 9 of that Act must be commenced "within one year after the discovery of the facts constituting the violation and within three years after such violation."

14 of the Exchange Act, 15 U.S.C. 78n and the Commission's rules adopted pursuant to that section, 17 C.F.R. 240.14a-1 to 240.14a-103. "The fact that there may well be some overlap [between the two sections] is neither unusual nor unfortunate" (393 U.S. at 468).

Moreover, Section 9(a)(2) does not cover all manipulative conduct. It only prohibits manipulation of a security registered on a national securities exchange and only when the manipulation is "for the purpose of inducing the purchase or sale of such security by others." Section 10(b), as implemented by Rule 10b-5, however, prohibits all manipulative conduct regardless of whether the security involved is registered on a national securities exchange or of the specific motive for the manipulation.

Were Section 10(b) and Rule 10b-5 inapplicable to man ipulations covered by Section 9(a)(2), there would be a different right of action where listed securities were manipulated to induce their purchase or sale than where nonlisted securities were manippulated or where listed securities were manipulated for a different reason. There is nothing to suggest that Congress intended this anomalous result, which would be likely to impair the orderly application of the federal securities laws.

b. There is no occasion for this Court to determine whether the statute of limitations in Section 9(e) must be applied to private causes of action for fraudulent manipulation of stock prices brought under Section 10(b) and Rule 10b-5. Unlike various other provisions of the federal securities laws which are circumscribed by express statutes of limitations,[5] Congress has not provided a statute of limitations for actions brought under Section 10(b), even after widespread judicial recognition of an implied right of action under that section.[6] Indeed, the federal

---

[5]See, *e.g.*, Sections 9(e), 18(c) and 29(b) of the Exchange Act, 15 U.S.C. 78i(e), 78r(c) and 78cc(b).

[6]In 1938, Congress amended Section 29(b) of the Exchange Act to provide for an express statute of limitations to actions brought against securities broker-dealers for violations of rules under Section 15(c)(1) of the Exchange Act, 15 U.S.C. 78*o*(c)(1). Section 15(c)(1), like Section 10(b), prohibits certain conduct but makes no reference to express private rights of action.

courts have employed state limitations periods in Rule 10b-5 actions for nearly a quarter of a century without any expression of disagreement from the Congress. Under these circumstances, "the silence of Congress [can be taken to] mean that is is federal policy to adopt the local law of limitation." *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395; cf. *Blue Chip Stamps* v. *Manor Drug Stores*, No. 74-124, decided June 9, 1975, slip op. 9.

Every court of appeals that has considered the issue has held that private actions under Rule 10b-5 are governed by the local law of limitation. See, *e.g.*, *Janigan* v. *Taylor*, 344 F.2d 781 (C.A. 1), certiorari denied, 382 U.S. 879; *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (C.A. 2), *Wolf* v. *Frank*, 477 F.2d 467 (C.A. 5); *Charney* v. *Thomas*, 372 F.2d 97 (C.A. 6); *Parrent* v. *Midwest Rug Mills, Inc.*, 455 F.2d 123 (C.A. 7); *Vanderboom* v. *Sexton*, 422 F.2d 1233 (C.A. 8), certiorari denied, 400 U.S. 852; *Douglass* v. *Glenn E. Hinton Investments, Inc.*, 440 F.2d 912 (C.A. 9); *Mitchell* v. *Texas Gulf Sulphur Co.*, 446 F.2d 90 (C.A. 10). Cf. *Newman* v. *Prior*, Current CCH Fed. Sec. L. Rep. par. 95,211 (C.A. 4).

In any event, this case does not present in clear form the question whether the statute of limitations in Section 9(e) applies to private actions under Rule 10(b)-5 for fraudulent manipulation of stock prices. Respondent alleged, in effect, that petitioner had negligently failed to supervise one of its employees, rather than that it had directly participated in a manipulative scheme. Thus, even if the statute of limitations in Section 9(e) controls private actions under Rule 10(b)-5 based upon fraudulent manipulation of stock prices, it may not apply to private actions, such as in the instant case, that are based upon a broker-dealer's alleged failure to adequately supervise the conduct of its employee.

2. Petitioner contends (Pet. 11-13) that a private action may not be implied under Section 17(a) of the Securities Act. That issue is not, however, presented in the instant case; the court of appeals expressly declined to resolve it (Pet. App. A26). The court permitted the Section 17(a) claim to remain only because it encompassed substantially the same allegations as those made under Rule 10b-5.

3. Petitioner also contends (Pet. 13-18) that since respondent alleged that petitioner had negligently failed to supervise one of its employees, the statute of limitations began to run (as to petitioner) when the employment terminated rather than, as the court of appeals held, when the fraud was discovered at the time the indictment was returned. The question whether statutes of limitations under the federal securities laws begin to run from the time fraudulent acts are terminated or from the time they are discovered is presented in *Ernst & Ernst* v. *Hochfelder*, No. 74-1042, in which this Court granted certiorari on April 14, 1975. This Court may therefore wish to hold this petition pending its disposition in that case.

CONCLUSION

The court of appeals was correct and, except for the questions involving the running of the statute of limitations, this case does not present in clear form any issue warranting review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari be denied. In view of the pendency of the limitations issue in *Ernst & Ernst* v. *Hochfelder*, however, it would be appropriate to defer action on the petition pending the decision in that case.

ROBERT H. BORK,
Solicitor General.

LAWRENCE E. NERHEIM,
General Counsel,

PAUL GONSON,
Associate General Counsel,

CHARLES E. H. LUEDDE,
Special Counsel,

MELVIN A. BROSTERMAN,
Attorney,
Securities and Exchange Commission.

AUGUST 1975.